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# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 831

OTHELLO WASHINGTON, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a–11a) is reported at 402 F. 2d 3. The memorandum opinion of the district court (Pet. 16a–20a) is reported at 251 F. Supp. 359.

### JURISDICTION

The judgment of the court of appeals was entered on September 17, 1968 (Pet. App. 3a). A petition for rehearing was denied on October 24, 1968. The petition for certiorari was filed on December 13, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether civil liability for non-payment of the taxes prescribed by the federal wagering tax laws

is extinguished as a result of this Court's decisions in *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62.

2. Whether a judgment enforcing a lien for wagering excise taxes should be set aside because it was based on evidence seized pursuant to a search, conducted under warrant and conceded at the trial to be lawful, on the ground that the search was in fact unlawful in light of the subsequent holdings in *Marchetti* and *Grosso.*

3. Whether, in proceedings to enforce a federal tax lien, the district court had statutory authority to order a sale of petitioner's real estate free of, but giving priority to the present value of, his wife's contingent dower interest.

**STATUTES INVOLVED**

Internal Revenue Code of 1954, as amended (26 U.S.C. 1 *et seq.*):

> SEC. 4401. IMPOSITION OF TAX.
>
> (a) *Wagers.*—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.
>
> * * * * *
>
> SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.
>
> (a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United

States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

(b) *Parties.*—All persons having liens upon or claiming any interests in the property involved in such action shall be made parties thereto.

(c) *Adjudication and Decree.*—The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.

* * * * *

Code of Virginia (1950):

SEC. 64–27. *Of what a widow shall be endowed.*—A widow shall be endowed of one-third of all the real estate whereof her husband, or any other to his use, was, at any time during the coverture, seized of an estate of inheritance, unless her right to such dower shall have been lawfully barred or relinquished; but if he dies wholly intestate and without issue of the marriage which was dissolved by his death or of a former marriage, his widow shall be endowed of one-third of such real estate, as aforesaid, and, in addition thereto, subject to

> the right of her husband's creditors, of all the residue of such real estate of her husband; or if he dies partially intestate and without any such issue, his widow shall be endowed of one-third of such real estate, as aforesaid, and, in addition thereto, subject to the rights of her husband's creditors and after the rights of the devisee or devisees under her husband's will shall have been fully satisfied, of all the residue, if any, of such real estate.

**STATEMENT**

An action under Section 7403 of the Internal Revenue Code of 1954 to enforce a lien for unpaid wagering excise taxes, assessed under Section 4401 of the Code, was brought by the government against petitioner.[1] The district court rendered a judgment sustaining the assessment (with a slight reduction) (Pet. App. 12a, 19a–20a), and ordered that petitioner's farm be sold at public auction free of a mortgage lien and of the contingent dower interest of petitioner's wife, the proceeds of the sale to be used first to satisfy the mortgage lien, second to pay the present value of the dower interest, and third to satisfy the lien for excise taxes, with any remaining balance to be paid to petitioner (Pet. App. 13a). In the district court, petitioner admitted that he was liable for wagering excise taxes, but contended that the amount claimed by the

[1] The government also sought a judgment for the 50-percent fraud penalty, but did not appeal from the denial thereof for lack of evidence. And the government conceded in the court of appeals that the judgment should not include the 25-percent delinquency penalty, which the district court had included in its judgment, since the imposition thereof had not been sought in the assessment against petitioner (see Pet. App. 5a).

government was excessive (Pet. App. 4a). At the trial Internal Revenue agents testified that they had obtained a search warrant pursuant to which they had visited petitioner's farm on May 2, 1961, and that they had discovered petitioner in the act of conducting a gambling operation. Petitioner conceded at trial that the search warrant was properly issued and executed (*ibid.*).[2]

During the pendency of petitioner's appeal, this Court decided *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, and petitioner filed with the court of appeals a supplemental memorandum based on those decisions (Pet. App. 5a–6a). Concluding that those decisions did not extinguish civil liability for the prescribed taxes (Pet. App. 8a), that nothing in *Marchetti-Grosso* invalidated the search warrant (Pet. App. 9a), and that petitioner's farm could properly be sold free of his wife's dower interest to satisfy the tax lien (Pet. App. 11a), the court of appeals affirmed the judgment below, except for the delinquency penalty (see note 1, *supra*).

**ARGUMENT**

1. Clearly the court of appeals was correct in holding (Pet. App. 3a–9a) that this Court's decisions in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, do not require a reversal of the purely civil judgment involved in this case. It

[2] On January 21, 1962 (prior to the initiation of the civil action here involved), petitioner pleaded guilty to an information charging him with engaging in the wagering business without paying the special occupational tax imposed by Section 4411 of the Code (see Pet. 2–3).

seems clear beyond cavil that the Court in *Marchetti-Grosso* did not hold the wagering tax laws unconstitutional (see 390 U.S. at 41–42, 60–61). All the Court held was that *criminal punishment* for noncompliance with these laws was inconsistent with the privilege against self-incrimination. Yet, petitioner contends (Pet. 4–8) that "enforcement of these tax laws * * * is not constitutionally permissible," even insofar as civil liability for the prescribed taxes is concerned, because the present registration and filing requirements go "to the heart of the statutes" (Pet. 5). He further mentions that the evidence supporting the present tax assessment and judgment was illegally obtained because it was seized in a raid which was unlawful because, although it was authorized by an otherwise proper warrant, it was "an incident to enforcement of the wagering tax laws" (Pet. 5). He asserts a conflict with *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693, where it was held that unlawfully seized evidence could not be used in proceedings to effect the forfeiture of property. None of these contentions has merit.

In footnote 7 of the *Grosso* opinion (390 U.S. at 69–70), this Court explicitly noted that it was in no respect holding "that a proper claim of privilege extinguishes liability for taxation," but only that "such a claim of privilege precludes a criminal conviction." And in *Marchetti* (390 U.S. at 61), the Court stated that only upon a proper plea of privilege is a person shielded "from the various penalties prescribed by the wagering tax statutes." Accordingly, the court below here correctly observed (Pet. App. 6a–8a):

> The language of the Supreme Court in both decisions * * * indicates no holding that the excise tax is constitutionally impermissible or even that a properly asserted claim of the privilege against self-incrimination would extinguish the liability for the payment of taxes. * * *
>
> Appellants contend that the Court in *Grosso* nullified the excise tax and the entire self-assessment scheme for its collection and, having done so, the Court was merely suggesting in * * * footnote 7 * * * that future legislation might devise a valid tax enforceable by different methods not involving self-incrimination.[3] We conclude, however, that the Court in *Grosso* carefully avoided holding that the tax itself was void. * * *
>
> In view of the Supreme Court's express disclaimers, we are of the opinion that the civil liability here involved remains entirely valid and that the only question of a constitutional nature which could arise here would involve only a collateral matter such as whether the procedures used in this case for determining or collecting the tax were so violative of fundamental rights as to require the overturning of a judgment thus procured.

Turning then to the question of the propriety of the search conducted in light of this Court's subsequent decisions in *Marchetti* and *Grosso,* the court

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[3] That contention seems undermined by the very language of footnote 7 in *Grosso*, where the Court referred to "*the* excise tax" and "*the* tax" (390 U.S. at 69–70, n. 7), and by the references in *Marchetti* to "*these* wagering tax provisions" and "*the* wagering tax statutes" (390 U.S. at 61) (emphasis added).

below further properly pointed out (Pet. App. 8a–9a):

> The Supreme Court did not invalidate the wagering tax statutes; it did not abolish the criminal offenses therein specified; it did not say that an indictment or information will not lie. The carefully circumscribed holding is that a defendant may not be *convicted* of a criminal violation of the wagering tax laws *if* he has properly claimed his constitutional privilege against self-incrimination. Under the circumstances, we conclude that where, as here, there exists probable cause for belief that an offense has been committed (which appellants conceded) a valid search warrant may issue even though the Government may be unable to convict the defendant if he properly raises his claim of privilege against self-incrimination.[4] * * *

There is no conflict of authority on the issues relating to the alleged effect of *Marchetti* and *Grosso* in the instant context. *One 1958 Plymouth Sedan* v. *Pennsylvania, supra,* involved the admissibility of evidence obtained in violation of the Fourth Amendment proscription against unreasonable searches and

[4] Petitioner seeks to question (Pet. 6) the court's conclusion that search warrants relating to wagering tax violations may validly be issued in the future, *i.e.*, after the date of the *Marchetti* and *Grosso* decisions. However, the instant case involves a search conducted in 1961, pursuant to a warrant based on probable cause under the law as it then existed. Accordingly, no purpose of deterrence would be served by applying an exclusionary rule to this case, whether or not similar warrants may properly be issued after *Marchetti-Grosso.*

seizures in a State forfeiture proceeding which this Court characterized as "quasi-criminal" in nature. It is obvious that neither factor is involved here.

Nor is there any conflict with *United States* v. *United States Coin and Currency,* 393 F. 2d 499 (C.A. 7), certiorari granted, November 18, 1968, No. 477, this Term. In that case, the court of appeals held that a forfeiture of property under 26 U.S.C. 7302, predicated upon a failure to register and pay the special occupational tax as required by 26 U.S.C. 4411 and 4412, amounted to a penalty imposed upon the invocation of the privilege against self-incrimination, and thus was barred by the *Marchetti-Grosso* rationale.[5] We have taken the position in that case that a forfeiture of property under Section 7302 is not tantamount to a criminal sanction within the meaning of *Marchetti* and *Grosso,* nor in any other respect an indirect penalty which might make the privilege applicable (see Brief for the United States, No. 477, this Term). But even if this Court should hold to the contrary, such a result would not be inconsistent with the holding of the court below. All that court held was that the enforcement of a purely civil tax liability—occasioned by non-compliance with a lawfully enacted taxing statute—was wholly outside the ambit of the *Marchetti-Grosso* rationale, and worked no infringement upon the Fifth Amendment privilege

[5] Compare *United States* v. *One 1965 Buick*, 392 F. 2d 672 (C.A. 6), pending on petition for a writ of certiorari, No. 619, this Term, where the court of appeals reached the opposite conclusion, finding the *Marchetti-Grosso* rationale inapplicable to forfeiture proceedings.

against self-incrimination. That conclusion is clearly correct, and warrants no further review.[6]

2. Petitioner's contention (Pet. 8–11) that the district court lacked authority to order a sale of his real estate free of his wife's inchoate dower interest, and that the translation of the dower interest into its present cash value represented an attempt to place a federal definition on State-created interests in property, is without merit. The district court properly followed State law in recognizing the dower interest here involved, and correctly applied Section 7403 of the Code in ordering a sale of the entire property, the proceeds to be subject to a superior lien to reimburse the wife for the present value of her contingent interest (Pet. App. 12a–15a). It is immaterial if a judicial sale under Virginia law conveys only a title subject to the wife's dower interest (Pet. 10), since federal law controls the disposition of such property interests, once they are determined according to State law. See *Aquilino* v. *United States*, 363 U.S. 509, 514.

Here Section 7403(b) of the Code required that all persons "having liens upon or claiming any interest in the property" be made parties to the action. Section 7403(c) authorized the district court to "determine the merits of all claims to and liens upon the property," and to decree a sale of the property and a distribution of the proceeds in accordance with the interests of the parties and of the United States. The phrase, "any interest in the property," being all-inclusive, must be taken to include a dower interest,

[6] Nor, in our view, is there any occasion to withhold action on the instant petition because of the pendency of Nos. 447 and 619, in light of the dissimilarity of the questions involved.

whether inchoate or vested. Furthermore, the authority to effect a distribution among all such claimants necessarily implies the authority to order a sale free of all liens and claims. Any other interpretation would have a crippling effect on the power to collect taxes out of a taxpayer's property and would directly contradict the plain words of the statute.

Petitioner cites (Pet. 8–9) *Folsom* v. *United States,* 306 F. 2d 361, where the Fifth Circuit held that only the taxpayer's interest in property could be sold, and not the interest of his co-tenant. We submit that *Folsom* is plainly wrong, as contrary to the evident meaning of Section 7403. The Seventh Circuit refused to follow *Folsom* in a similar co-tenancy type of case, *United States* v. *Trilling,* 328 F. 2d 699, and the Fourth Circuit has now refused to follow *Folsom* in the instant case, albeit involving dower rather than the interest of a co-tenant. We have found no cases which have followed *Folsom,* and submit that the granting of certiorari is not required, at least presently, in order to resolve such conflict as exists.

## CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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CERTIORARI DENIED N.C.R.

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